SUPREME COURT, U. S.

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In the

Supreme Court of the United States

October Term, 1967

No. 601

THE STATE OF WYOMING and GULF OIL CORPORATION,
Petitioners,

VERSUS

STEWART L. UDALL, individually and as Secretary of the Interior; ED PIERSON, individually and as Supervisor for the State of Wyoming, Bureau of Land Management, Department of the Interior; DAVID B. MORGAN, Acting Manager, Oil and Gas, Cheyenne, Wyoming Land Office, Bureau of Land Management, Department of the Interior, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Tenth Circuit

BRIEF IN OPPOSITION

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PREFATORY COMMENT

Petitioners' statement with respect to the opinions below, jurisdiction and the statutes involved is correct. Accordingly, we will not again set these matters forth, but will direct our opposition solely to the matters which we question.

QUESTION PRESENTED

The question presented in this case was stipulated in the courts below. Petitioners have seen fit to restate the question. We believe the stipulated question more properly presents the question before the Court. As so stipulated, the question reads:

> "The question involved herein is whether the Secretary of the Interior has authority to dispose of oil and gas deposits in the Union Pacific right of way under the Act of May 21, 1930, 46 Stat. 373, as property of the United States, or whether the Secretary lacks such authority because the minerals retained by the United States under the railroad grant subsequently passed to the State of Wyoming under the Act of July 10, 1890, 26 Stat. 222, granting school land to the State. (R. 36)."

—o—

STATEMENT OF THE CASE

The petitioners correctly state the factual background of the case, but do not, in the opinion of this respondent, properly state the basis of the decision of the Secretary of the Interior in this matter, referred to on page 10 of the petition. On page 10 petitioners state:

> "* * * The basis of the Secretary's decision was that this Court had not held this right-of-way to be an easement in *Union Pacific,* as it had held post-1871 rights-of-way to be in *Great Northern Ry. Co. v. United States,* 315 U. S. 262 (1942) * * *."

This is only a partial statement of the basis of the Secretary's decision, as even a cursory reading thereof, as set forth in Appendix A, pages ix to xviii of the petition,

will demonstrate. The Secretary emphasized particularly that this Court, in *United States v. Union Pacific R. Co.*, 353 U. S. 112 (1957), the case principally relied upon by petitioners here and in the proceedings below, did not overrule the case of *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267 (1903), which held that upon the construction of the railroad prior to the effective date of the filing of homestead entries on the particular sections traversed by it, "the land forming the right of way therein was taken out of the category of public lands subject to preemption and sale, and the land department was therefore without authority to convey rights therein." In other words, in the *Townsend* case the Supreme Court has specifically held that the grant of right of way to Union Pacific's predecessor and the construction of the railroad over it had taken the land out of the category of public lands and it was no longer subject to disposal by a general grant. The Secretary completed his analysis of *Union Pacific* by saying at page xviii of the Appendix to the petition:

> "Accordingly, it is concluded the *Union Pacific* case did not change the previously established law that only the United States had the rights to minerals underlying pre-1875 act rights-of-way, that the oil and gas deposits underlying the Union Pacific's right-of-way are in the United States, and that the land office properly sought to dispose of them pursuant to the act of May 21, 1930, supra."

Further, the petitioners purport to state the holding of the Court of Appeals as follows (see page 11 of the petition):

> "Petitioners then appealed to the Court of Appeals. It too held that the oil and gas deposits under the right-of-way were excluded from Wyoming's school land grant, but upon a still different construction of the applicable statutes and interpretation of this Court's decision in *Union Pacific.* It held that, in consequence of § 4 of the 1864 Act removing coal and iron land from the 'mineral lands' exception in the railroad's grant, the railroad owned the coal and iron deposits underlying its right-of-way and that because of such ownership, Wyoming acquired no interest in the right-of-way upon the later grant to it of the traversed sections. App. A, *infra,* pp. xxx-xxxix."

Here too the petitioners do not adequately state the Court's holding. The Court of Appeals held that this Court in *Union Pacific* did not overrule *Northern Pacific Ry. Co. v. Townsend,* supra, and pointed out that the holding in *Union Pacific* was premised on the proposition that the "mineral lands" exception in Section 3 of the Act of July 1, 1862, 12 Stat. 489, 491-492, applied to the Section 2 grant of right of way as well as the grant of alternate sections in aid of construction; in other words, that it applied to both the right of way grant and the land grant. The Circuit Court then held that the amendment contained in Section 4 of the Act of July 2, 1864, 13 Stat. 356, 358, to the effect that the exception of mineral lands as used in Section 3 of the 1862 Act does not include coal and iron, likewise applied to the right of way grant, the effect being that the railroad not only received a right of way with the perpetual and exclusive use of the surface, but also received the right to explore for, develop, and mine the underlying coal and iron. The Circuit Court, then relying upon the proposition that Section 4 of the

Enabling Act, 26 Stat. 222, 224, under which Wyoming received its school lands, provided "where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress," indemnity lands could be selected, concluded that if any part of any section to be granted for school land purposes had been disposed of under an act of Congress, the state on admission did not get that part of the section, and reasoned that the grant of the exclusive and perpetual use of the surface, together with the grant of the coal and iron to the railroad with the incidental rights of exploration and development, disposed of the part of the section traversed by the right of way within the meaning of the school land grant so as to exclude it therefrom.

From the foregoing, which, of course, only purports to present a very summary statement of the Court's opinion, it is clear that the petitioners have greatly oversimplified in their petition for a writ of certiorari the holding of the Court of Appeals which they seek to have this Court reverse.

ARGUMENT

Union Pacific's argument will take up seriatim the "Reasons for Granting the Writ" as set forth in the petition. Our first proposition is that:

1. The Court of Appeals has construed the applicable statutes in a manner in accord with this Court's construction in United States v. Union Pacific R. Co., 353 U. S. 112 (1957).

The basic reason which petitioners allege as the ground for the granting of a writ is that

> "'Although the question is novel, construction of the applicable statutes is not, and the Court of Appeals has construed them in a manner which is not in accord with this Court's construction in *Union Pacific.* The Court of Appeals assumed, without discussion, that this Court left open the question whether § 4 of the amending Act of 1864 removing coal and iron land from the 'mineral lands' exemption contained in the 1862 Act, had any effect on the railroad's right-of-way grant.
>
> "Proceeding on this assumption and the 'narrow holding' of *Union Pacific* 'that the railroad did not get title to the underlying oil and gas by virtue of the statutory grant,' App. A. *infra,* p. xxxviii, the Court of Appeals construed the effect of the 1864 amendment to be that by the 1862 Act:
>
> > " 'the railroad not only received a right-of-way with the perpetual and exclusive use of the surface, but also received the right to explore for, develop and mine the underlying coal and iron.'
>
> "It concluded that Union Pacific's right to mine the coal and iron elevated its estate in the right-of-way to more than a 'surface easement' and that, accordingly, 'title to the servient estate did not pass with the conveyance of the encumbered tract.' "

First of all, may we flatly state that the statement contained in the foregoing that

> "Although the question is novel, construction of the applicable statutes is not, and the Court of Appeals has construed them in a manner which is not in accord with this Court's construction in *Union Pacific.*"

is not correct. The construction which the Court of Appeals has placed on *Union Pacific* is strictly in accord with the Supreme Court's holding.

In *Union Pacific* the United States brought an action in the Federal District Court for Wyoming seeking to enjoin Union Pacific from using its right of way for the purpose of removing oil and gas and asking that title to minerals underlying the right of way be quieted in the United States. This litigation terminated in a decision of the Supreme Court holding that under the language of the granting acts, title to the oil and gas is in the United States and quieted in it the title to the oil and gas in the entire right of way of Union Pacific. In considering this matter, it should be borne in mind that under the Act of July 1, 1862, which was amended by the Act of July 2, 1864, there were two separate grants to Union Pacific's predecessor, i. e., a grant of right of way, which was covered by Section 2 of the Act of July 1, 1862, and a land grant in aid of construction separate and distinct from the right of way grant, set forth in Section 3. "Mineral lands" were excepted from the land grant. Section 3 of the Act of July 1, 1862, was amended by Section 4 of the Act of July 2, 1864, to provide in effect that the exception of "mineral lands" did not include coal and iron. Undoubtedly this was done because it was considered that the minerals coal and iron would be of value to the railroad company in aid of construction of the railroad, the basic purpose for the land grant. The Supreme Court in *Union Pacific,* in determining that the grant of right of way contained in Section 2 of the Act of July 1, 1862, did not include the oil and gas, relied

upon Section 3 of the Act (the section having to do with the land grant, as distinguished from the right of way grant), which provided:

> "* * * That all mineral lands shall be excepted from the operation of this act * * * *"

and reasoned from this, at page 114 of the opinion, that:

> "* * * whatever rights may have been included in 'the right of way,' mineral rights were excepted by reason of the proviso in §3 excepting 'mineral lands.'"

In other words, the Supreme Court considered the land grant Section 3 in pari materia with the right of way grant in Section 2. As pointed out above, Section 3 of the Act of July 1, 1862, was amended by Section 4 of the Act of July 2, 1864, insofar as the exception of mineral lands was concerned, so that it read:

> "* * * And the term 'mineral land,' wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land."

The effect of this amendment is clear, following the Court's reasoning—while oil and gas in the right of way were excepted from the grant and retained by the United States, coal and iron were not.

At page 13 of their petition, the petitioners state that:

> "This Court did not note that coal or iron or any other minerals were not embraced in the reservation of 'all mineral rights' * * *."

This is correct, but there was not any necessity for the Court to do so. The Court in *Union Pacific* was considering

only the question of the ownership of the oil and gas, not coal and iron; the phrase "mineral rights" must be considered in the light of what was before the Court. The fact that the decision in *Union Pacific* did not quiet title in the United States to coal and iron was recognized in the Judgment on Mandate filed in *Union Pacific* (Stip. Ex. 4, R. 40, 53-54), in which it was specifically provided in paragraph 5 thereof:

> "As used in this judgment, the term 'minerals' does not include coal and iron and this judgment does not purport to decide the rights of the parties with respect to the ownership of or right to remove coal and iron deposits in and from said right of way. As far as any issues relating to coal and iron deposits are concerned, this judgment is entered without prejudice to the rights of either party."

While the ownership of coal and iron was, therefore, not disposed of in that case, the effect of the Court's reasoning is clear, and that is, that coal and iron deposits underlying the right of way were granted to Union Pacific's predecessor under the right of way grant and are now owned by Union Pacific. The fact that title to the coal and iron is in the Union Pacific is irreconcilable with the contention of the petitioners that Union Pacific has a mere surface interest in the right of way.

2. The Court's decision in Great Northern Ry. Co. v. United States, 315 U. S. 262 (1942), and the current regulations issued by the Secretary in consequence of that decision are not in point in this case and the decision of the Court of Appeals is not inconsistent therewith.

At page 14 of their petition the petitioners allege that the decision of the Court of Appeals, as well as of the Secretary,

> "also appears to be inconsistent with this Court's decision in *Great Northern* and with the current regulation which the Secretary issued in consequence of that decision.",

here referring to the case of *Great Northern Ry. Co. v. United States*, 315 U. S. 262 (1942), and a regulation, the case and the regulation both having to do with right of way which was granted under the General Right of Way Act of March 3, 1875, 18 Stat. 482, not under the Acts under consideration here. That this Act was not applicable to right of way granted under the Acts of 1862 and 1864, supra, was clearly recognized by the Supreme Court in *Union Pacific*.

In the *Great Northern* case, the Supreme Court specifically distinguished between the limited fee cases applying to the 1862-1864 right of way and the cases arising under grants made subsequent to 1871, pointing out at page 273:

> "* * * The Act was the product of a period, and, 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.' "

The Court then went on to say at pages 273-275 of the opinion as follows:

> "Beginning in 1850, Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain. This policy incurred great public disfavor, which was crystallized in the following resolution adopted by the House of Representatives on March 11, 1872:

"'*Resolved,* That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people require that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.' Cong. Globe, 42d Cong., 2d Sess., 1585 (1872). After 1871 outright grants of public lands to private railroad companies seem to have been discontinued. * * *

"The burden of this special legislation moved Congress to adopt the general right of way statute now before this Court. Since it was a product of the sharp change in Congressional policy with respect to railroad grants after 1871, it is improbable that Congress intended by it to grant more than a right of passage, let alone mineral riches. The presence in the Act of § 4, which, as has been pointed out above, is so inconsistent with the grant of a fee, strongly indicates that Congress was carrying into effect its changed policy regarding railroad grants."

Thus, it is perfectly clear that the Supreme Court in *Great Northern* was making and did make a clear distinction between the grant involved in the *Great Northern* case and the grants involved prior to 1872. At page 119 of the opinion in *Union Pacific* the Court quoted from the *Great Northern* case and stated that:

"* * * In that case we noted that a great shift in congressional policy occurred in 1871: *that after that period only an easement for railroad purposes was granted, while prior thereto a right of way with alternate sections of public land along the right of way had been granted.* In the latter connection we said, 'When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is

little reason to suppose that it intended to give only an easement in the right of way granted in the same act.' " (Emphasis supplied.)

While the Court went on to hold that the decision was not pertinent to the case then before it because in the *Great Northern* case there had been no grant of a right of way with a reservation of "mineral land," it did not in any way suggest that the right of way involved in the *Great Northern* case, denominated as an easement, was of the same nature as the right of way granted under the Acts of 1862 and 1864. Obviously, if the Court's opinion was that the rule in *Great Northern* was controlling, it would have simply disposed of *Union Pacific* on that ground; this, as we have noted, it did not do.

In view of the foregoing, the fact that the regulations cited, which as above mentioned were issued under the Act of 1875 and Acts subsequent thereto, do not apply is evident. The regulations were promulgated in a decision of the Department of the Interior to be found in 37 L. D. commencing at page 787. That these regulations refer only to 1875 and subsequent grants of right of way is evident, the right of way statutes specifically referred to being that of March 3, 1875, 18 Stat. 482, that of March 3, 1899, 30 Stat. 1233, and the Act of February 7, 1905, 33 Stat. 702.

3. The importance of the question is not such as to justify the grant by this Court of a writ of certiorari.

Finally, at pages 16 and 17 the petitioners state:

"The question here presented is an important one, since the interests of not less than seventeen States, as well as countless individuals, will be affected, if not actually determined by the decision of this case.",

and then go on to show the mileage of railroad rights of way in various states, not only of Union Pacific but of other railroads constructed pursuant to "five other grants which are similar to Union Pacific's." It appears here that the other individuals to whom the petitioners have reference are the holders of lands, traversed by such right of way, under homestead patents, since petitioners' final conclusion is that

> "* * * It would seem to follow that decision here will in practical effect determine the rights of all of the States and individuals to whom the United States has granted or patented tracts crossed by the rights-of-way of these land grant railroads."

The tabulation of mileage of the various railroads' right of way set forth in the Appendix to the petition we are not in a position to dispute, but we suggest that a mere recital of the mileage is irrelevant in itself. The question involved in this case has to do basically not with the entire right of way mileage of various railroads, but with the right of way as it crosses school land sections of various states. Just how many school land sections may have been crossed by such right of way we do not know. It is entirely conceivable that in certain of the states no school land sections were crossed. This is a matter with respect to which the petitioners have not seen fit to inform the Court. Certainly in urging a point of this kind it should be their obligation to do so. A mere statement of mileage standing alone, as mentioned above, does not in and of itself mean anything.

The individuals referred to constitute either patentees or successors in interest to patentees of lands traversed by

Union Pacific's right of way. To say that this decision will in practical effect determine their rights implies that there has been no determination of their rights. This is not correct. As previously mentioned, the decision of this Court in *Northern Pacific Ry. Co. v. Townsend,* supra, decided in 1903, held that patentees under homestead patents did not secure any interest in the right of way or the land occupied by right of way granted to railroads under the Acts of 1862 and 1864. This case was referred to three times with apparent approval by this Court in *Union Pacific,* the case most relied upon by petitioners, and certainly was not overruled. At page 270 of the decision in *Northern Pacific Ry. Co. v. Townsend,* supra, Mr. Justice White, in delivering the opinion of the Court, stated:

> "At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to pre-emption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions."

Accordingly, this decision affects only state school lands actually traversed by such right of way and not individuals holding under patents.

Importance such as to justify the granting of a writ must arise, if at all, as we understand it, from the effect of the decision of the Circuit Court of Appeals if permitted

to stand. We have heretofore endeavored to show that in its present status, this decision simply enunciates established rules of law.

In this case, petitioners seek to have the Court reverse the decision of the Circuit Court of Appeals by construing its holding in *Union Pacific* in a manner which would be totally inconsistent with its reasoning in determining that Union Pacific did not secure title to the oil and gas underlying its right of way and quieting title thereto in the United States, and by overruling its prior decision in *Northern Pacific Ry. Co. v. Townsend,* supra. The effect of such a decision by this Court would be to strip from the United States title to the oil and gas underlying all such railroad right of way and vest it in the abutting landowner, whether a state, an individual landowner, or the railroad itself, except in those cases where the abutting land is still owned by the United States; it would, in a large measure, render nugatory the Court's holding in *Union Pacific* insofar as title to the oil and gas underlying such right of way was held to be in the United States.

CONCLUSION

In the opinion of this respondent, petitioners have not made a showing entitling them to a review by this Court. The petition for a writ of certiorari should be denied.

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